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Paul R. Van Dam; attorney general; attorney for respondent.
Alan K. Jeppesen; attorney for appellant.

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff/Respondent,	:	Case No. 890186
vs.	:	Category No. 2
STUART D. LUSCHEN,	:	
Defendant/Appellant.	:	

APPELLANT'S BRIEF

Appeal from the Order Denying Motion to Vacate Judgment dated March 13, 1988 in the Third District Court in and for Tooele County, the Honorable Pat B. Brian presiding. Defendant was convicted on April 11, 1988 of the crime of Possession of a Controlled Substance with Intent to Distribute, a Second Degree Felony in violation of Section 58-37-8(1)(a) UCA, 1953.

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

THE STATE OF UTAH, Plaintiff/Respondent, vs. STUART D. LUSCHEN, Defendant/Appellant.	:	Case No. 890186 Category No. 2

APPELLANT'S BRIEF

Appeal from the Order Denying Motion to Vacate Judgment dated March 13, 1988 in the Third District Court in and for Tooele County, the Honorable Pat B. Brian presiding. Defendant was convicted on April 11, 1988 of the crime of Possession of a Controlled Substance with Intent to Distribute, a Second Degree Felony in violation of Section 58-37-8(1)(a) UCA, 1953.

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STATUES CITED

OTHER AUTHORITIES

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Whether the defendant's conviction should be reversed because it was based on a plea which was not voluntarily given with an accurate understanding of the circumstances.

2. Whether the defendant was afforded effective and competent counsel when the defendant's public defender failed to explain the grounds for a habitual criminal allegation.

NATURE OF THE CASE

This is an appeal pursuant to Section 77-35-26(2)(b) Utah Code of Criminal Procedure, Rule 4(b) of the Rules of the Utah Court of Appeals and State v. Gibbons, 740 P.2d 1309 (Utah, 1987). The appeal is from the denial of defendant's Motion to Vacate Judgment which was denied by order of the Third District Court in and for Tooele County, State of Utah, the Honorable Pat B. Brian presiding, on March 13, 1989. Defendant had pled guilty to the crime of Possession of a Controlled Substance with Intent to Distribute, a second decree felony, in violation of Title 58, Chapter 37, Section 8(1)(a) U.C.A., 1953 on Monday, April 11, 1988, after having waived the preliminary hearing on the proceeding Friday, April 8, 1988. Defendant waived the waiting time for sentencing after pleading guilty, and the Court, the Honorable J. Dennis Frederick presiding, sentenced the defendant to serve one to fifteen years in the Utah State Prison, and pay a fine of $5,000 plus a surcharge of $1,250 with the commitment to be forthwith. Defendant moved to withdraw

his guilty plea on December 14, 1988. The Court denied the motion on February 13, 1989. Defendant was not present and moved to Vacate the Order on February 22, 1989. The Court denied that Motion on March 16, 1989, and defendant filed his notice of Appeal on March 23, 1989.

STATEMENT OF FACTS

At the time the defendant appeared for preliminary hearing, he was represented by a public defender attorney. The prosecutor offered to allow the defendant to plead to count I of the information, Possession of a Controlled Substance with Intent to Distribute, a second degree felony and the prosecutor would move to dismiss Count II, Possession of a Firearm by a Restricted Person, a third degree felony. The prosecutor also stated that if the defendant did not want to accept the offer, he would look into amending the information to include an enhancement of sentence charge of being a habitual criminal in violation of Section 76-8-1001 U.C.A., 1953. The defendant was so informed of the prosecutions position by his attorney, and the defendant agreed to accept the offer, and waived the preliminary hearing on Friday, April 8, 1988. The defendant was arraigned in District Court on the following Monday, April 11, 1988. He pled guilty to Count I and the State dismissed Count II. The defendant signed an "Affidavit of Defendant" which set forth the charge to which he was pleading, the degree of offense, the maximum penalty, the legal elements that must be proven beyond a reasonable doubt, the factual

conduct of the defendant which was the criminal violation, the constitutional rights the defendant would be waiving, and the consent of the defense counsel and prosecutor. The affidavit also set forth the plea agreement. It did not mention, however, the State's agreement not to pursue a habitual criminal enhancement upon conviction. The information on which the prosecution was founded did not include allegations of being a habitual criminal.

The defendant had been convicted previously of robbery, a second degree felony. The prosecutor had no knowledge of any other convictions. At the time of his arrest for the present conviction, he was found to have been in possession of one-half pound of methamphetamine, a schedule II controlled substance.

SUMMARY OF DEFENDANT'S ARGUMENT

The defendant's argument for the withdrawal of his plea of guilty has two basis: (1) His plea of guilty was not freely and voluntarily given because of the threat of filing the "habitual criminal charge," and (2) Defendant did not have the assistance of effective counsel. Defendant is entitled to file the motion subsequent to conviction, because there is no time limit governing the withdrawal of a guilty plea[1].

But for the threat of the habitual criminal enhancement which was not adequately explained to him, defendant maintains he would have gone to trial rather than plead guilty to Count I. The prosecutor had no grounds to file a habitual criminal allegation

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[1]See State v. Gibbons, 740 P.2d 1309 (Utah, 1987).

because defendant had not been twice previously convicted, as required by 76-8-1001 U.C.A., 1953, as amended, and if the prosecutor was going to amend, he would have had to have done so before the defendant's first appearance. He had already been before the magistrate and it was therefore unlikely that the prosecutor would have been successful in amending the information, even if the requiste number of convictions existed, which they did not. Further, the habitual criminal charge was not a separate offense as the defendant believed, and his attorney should have explained to him that it was simply an enhancement of sentence allegation.

Had defendant known these facts, he would have been appraised of his situation and could have made a knowing and voluntary decision as to whether to accept the offer of the State. As it was, he did not know the actual situation, which was more favorable to his position than what he believed it to be, and consequently, he may not have entered the plea of guilty. Because his plea was not freely and voluntarily given, it should be vacated, and he should be granted a preliminary hearing.

ARGUMENT

POINT I

THE DEFENDANT'S CONVICTION MUST BE REVERSED BECAUSE IT WAS NOT BASED ON A KNOWING AND VOLUNTARY PLEA OF GUILTY

The defendant did not knowingly and voluntarily plead guilty to the charge of Possession of a Controlled Substance with Intent to Distribute, a violation of Section 58-37-8(1)(a) U.C.A., 1953. He was under the misapprehension at the time of his plea that if he did not plead guilty, the State would amend the information to charge him with being a habitual criminal. He therefore concluded to plead guilty so as to avoid the possibility of being charged with what he thought was another offense, and to avoid another sentence for violation of that crime.

In the case of Mabry v. Johnson[2], The U. S. Supreme Court stated that

> [i]f a defendant was not fairly apprised of its consequences, his guilty plea can be challenged under the Due Process Clause. And when the prosecution breaches its promise with respect to an executed plea agreement, the defendant pleads guilty on a false premise, and hence his conviction cannot stand.

In the instant case, defendant maintains that there were promises made which were not kept by both his own attorney and by the prosecutor. Defendant's attorney did not advise him that the prosecutor had not included the habitual criminal allegations in

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[2]467 U. S. 504, 104 S.Ct. 2543, 81 L.Ed.2d 437 (1984).

the information already on file, and that he was bound to file the habitual criminal allegations at the time of filing the information pursuant to the procedure for habitual criminal charges, 76-8-1002 U.C.A., 1953,[3] and the provisions of 76-1-402(2)(b) U.C.A., 1953, which requires the prosecutor to proceed in one information on all charges known to him at the time of arraignment of the defendant. While defendant had agreed to plead to the one count prior to the preliminary hearing, he maintains that he did so only because of the promise not to file the habitual criminal charge. Had his attorney explained the elements of the habitual criminal charge, he would not have been under a misapprehension of the potential penalty in the case, and would have been better able to determine what kind of plea was in his best interests.

In the case of Fontaine v. United States,[4] the Supreme Court stated that "it is elementary that a coerced plea is open to collateral attack."[5] In the case of Stantobello v. New York[6], the U. S. Supreme Court vacated a defendant's plea of guilty based on a plea agreement, because the prosecutor had agreed not to make a recommendation of sentence, and at the time of sentencing another prosecutor inadvertently recommended the imposition of a maximum

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[3]**76-8-1002.** (1) In charging a person with being a habitual criminal, the information or complaint filed before the committing magistrate shall allege the felony committed within the state of Utah and the two or more felony convictions relied upon by the state of Utah.

[4]411 U. S. 213, 93 S.Ct. 1461, 36 L.Ed.2d 169 (1973).

[5]at 411 U.S. 215, 93 S.Ct. 1462.

[6]404 U.S. 257, 92 S.Ct.495, 30 L.Ed.2d 427 (1971).

sentence. The defendant immediately moved to set aside his guilty plea and the trial judge denied the motion, assuring the defendant that he was not influenced by the prosecutor's recommendation, thereafter sentencing the defendant to a maximum period of incarceration. In vacating the sentence, the Supreme Court said that any promises made as an inducement for the defendant's guilty plea must be fulfilled or there was no agreement for the entry of the plea.[7].

In the case of Machibroda v. United States[8], the Supreme Court, quoting from the case of Kercheval v. United States[9], said that

> [a] plea of guilty differs in purpose and effect from a mere admission or an extra-judicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence. Out of just consideration for persons accused of a crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences.

And in the case of State v. Gallegos,[10] the Utah Supreme Court stated that

> [b]ecause the entry of such a plea [of guilty] constitutes such a waiver [of important constitutional rights], and because the prosecution will generally be unable to show that it will suffer any significant prejudice if the plea is withdrawn, a presentence motion to withdraw a guilty plea should, in general, be liberally granted.
>
> In evaluating the reasons advanced for a presentence motion to withdraw a guilty plea, we accept the view that trial

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[7]id, at 449.

[8]368 U.S. 487, 82 S.Ct. 510 (1962).

[9]274 U.S. 220, 223.

[10]738 P.2d 1040 (Utah, 1987).

> courts should not attempt to decide the merits of a claim related directly to the merits of the charge against the defendant, thus passing on the question of his guilt or innocence.

While the instant case involves a motion to withdraw a guilty plea after sentencing, defendant submits there is a compelling and substantial reason for doing so. He waived important constitutional rights in anticipation of foregoing a more harsh sentence, when in fact, he would not have received a more harsh sentence. His sentence could not have been enhanced.

In the case of State v. Stilling[11], the defendant was sentenced to two concurrent sentences for aggravated robbery and being a habitual criminal. The defendant appealed and the Utah Supreme Court vacated the sentence and remanded for resentencing because the court erred in sentencing the defendant separately for the habitual criminal violation. The Supreme Court, in the unanimous opinion of the court written by Chief Justice Hall, stated that

> [t]his Court has consistently held that "the [habitual criminal] statute 'does not create a new crime; it merely enhances punishment' for the latest crime" [citations omitted]. Since no crime exists, there can be no sentence. Assigning a separate sentence for recidivism does more than enhance punishment for the latest crime, it penalizes an individual for past convictions. We see no reason to depart from the logic and consistency of cited precedent just because it is difficult to imagine that one sentence is enhanced when it is overlaid with an identical sentence. Defendant should have received a single sentence of five years to life for aggravated robbery and for being a habitual criminal.

While the sentence imposed for defendant's plea was a second degree felony sentence of one to fifteen years, and the habitual

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[11]770 P.2d 137, 145 (Utah, 1989).

criminal allegation would have enhanced that sentence to five years to life imprisonment, there was no basis for filing a habitual criminal allegation. Defendant did not meet the criteria of the habitual criminal statute. He had not been twice previously convicted, and the habitual criminal allegation was not filed with the original information. Had defendant been appraised of those facts he could have made a determination of his situation in a knowing manner and decided whether to accept the offer of the State or not.

The State's threat to charge defendant with being a habitual criminal is particularly egregious because the State did not have a record of defendant's convictions which met the criteria. Furthermore, the State had no knowledge as to whether defendant had been represented by counsel at the time of his conviction for the one prior offense of robbery.[12]

Lastly, the affidavit of the defendant did not set forth the fact that the State was foregoing an opportunity to amend the information to allege the habitual criminal enhancement. Hence, the affidavit did not set forth the facts upon which the plea was being entered. Section 77-35-11 U.C.A., 1953, requires that the Court ensure that the plea discussion and agreement be set forth:

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[12]The case of State v. Triptow, 770 P.2d 146, 149 (Utah, 1989), held that the defendant has the burden of raising the issue of whether he had counsel or effectively waived the right to counsel at the time of conviction of prior crimes which form the basis for the habitual criminal allegation, after which the state has the burden of proving that the defendant did waive counsel or had counsel at the time of those convictions.

> (6) Whether the tendered plea is a result of a prior plea discussion and plea agreement and if so, what agreement has been reached.

In the case of State v. Gibbons, id, the Utah Supreme Court stated:

> [t]he details of any plea bargain should be set forth in the affidavit, as well as a disclaimer concerning any sentencing recommendations as required by Rule 11(e).

The Court also stated that the burden of "establishing compliance with those requirements" is "on the trial judge. It is not sufficient to assume that defense attorneys make sure that their clients fully understand the contents of the affidavit."[13] The affidavit of the defendant did not meet the requirements of Rule 11. It did not mention the State's promise not to amend the information to include the habitual criminal allegations. The Court did not inquire as to whether the affidavit was complete, and included the entire plea agreement of the parties. Hence, the Court did not fulfill its burden of determining the plea to be freely and voluntarily given, and defendant's motion to withdraw his plea should be granted and the sentence vacated.

In the case of Mosher v. LaVallee[14] the defendant was told by his public defender counsel that the judge had agreed to impose a lenient sentence in exchange for his plea of guilty. This was in fact not true.

> When Mosher pled guilty before Judge Trainor, he was specifically asked by the Court whether any

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[13]id, at 60 Utah Advance Reports 38.

[14]351 F.Supp. 1101 (S.D.N.Y., 1972).

> promises or threats had been made to induce him to plead guilty. Mosher gave a negative answer. His attorney said nothing.
>
> While this must be taken into account in evaluating Mosher's contention, it is not of controlling weight or significance.[15]

Likewise, the fact that neither Mr. Luschen nor his attorney mentioned the habitual criminal promise is not of controlling weight in this case.

> Judicial notice of tensions surrounding acceptance of pleas makes it impossible to decide without a hearing that defendant understood the significance of the District Attorney's statement for the record that no promise was made. But even if the defendant did hear and did comprehend, his failure to challenge when his attorney stood mute is not conclusive evidence of acquiescence. . . . [T]he defendant usually answers in the negative, and the prosecutor and defense counsel seldom indicate to the contrary.[16]

Obviously, the defendant is not in a position at the time of sentencing to contradict what is stated in the affidavit when his attorney says nothing about the habitual criminal charge.

POINT II

THE DEFENDANT WAS DEPRIVED OF EFFECTIVE COUNSEL AT THE TIME OF HIS WAIVER OF PRELIMINARY HEARING AND ENTRY OF GUILTY PLEA, AND HIS CONVICTION SHOULD BE VACATED

The defendant would not now be filing this appeal were he adequately appraised of the State's inability to have filed the

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[15]id., at 1107.

[16]United States v. Mancusi, 275 F.Supp. 508, 519 (E.D.N.Y., 1967).

habitual criminal allegation. It goes without argument that defendant was not adequately represented at the time of his preliminary hearing and plea of guilty.

> No one will question that the right of an accused to counsel means by a competent member of the Bar who shows a willingness to identify himself with and represent the interests of the defendant in good faith.[17]

In the case of United States v. Easter,[18] the court stated that

> [i]n order to assert a Sixth Amendment infirmity on this ground . . . the circumstances must demonstrate that which amounts to a lawyer's deliberate abdication of his ethical duty to his client. There must be such conscious conduct as to render pretextual an attorney's legal obligation to fairly represent the defendant.

Defendant submits that such was the case here. While defense counsel states in paragraph five of his affidavit that he reiterated the conversation with the prosecutor about the filing of the habitual criminal charge, and related to the defendant the "nature of an [sic] habitual criminal allegation." Yet, no where does the defense counsel state that he explained to the defendant or made inquiry as to whether there was grounds to file such a charge, or whether the state would be allowed to amend after the initial appearance to file such a charge. In the case of McAleney v. United States[19] the Court stated that

> [t]here is accordingly a duty on attorneys to make sure whenever participating in plea bargaining proceedings, which are under the close

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[17] State v. Turner, 22 U.2d 294, 452 P.2d 323, 324 (1969).

[18] 539 F.2d 663 (8 Cir., 1976)

[19] 539 F.2d 282 (1st District, 1976).

> scrutiny of the court, that any information they convey to their client is accurate and complete and that they understand what the applicable law and rules are.

Obviously, defense counsel did not meet this test in the instant case. If he had explained to the defendant how groundless the State's threat was, the defendant would not have been under the apprehension of having a more serious offense charged against him.

In the case of Codianna v. Morris,[20] the Utah Supreme Court stated the three factors to be considered in determining competency of defense counsel: (1) the burden is on the defendant to show by proof of a demonstrable reality and not a speculative nature that his counsel was ineffective[21]; (2) the attorney's "legitimate exercise of judgment" in the trial strategy which does not produce the results desired, does not constitute ineffective assistance of counsel and (3) the deficiency of counsel must be prejudicial[22]. Defendant's counsel was ineffective according to the Codianna tests because: (1) the defense counsel's own affidavit offered by the State at the time of arguing the Motion to Withdraw the guilty plea demonstrates that the defendant was not told that the habitual

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[20]660 P.2d 1101 (Utah, 1983).

[21]As stated in State v. Morehouse, 748 P.2d 217 (Utah, App. 1988), this means "showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."

[22]This means, as stated in State v. Morehouse, 748 P.2d 217 (Utah App. 1988), that "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." quoting Strickland v. Washington, 466 U.S. 668, 667 (1984).

criminal allegation criteria did not apply to him. (2) There was no strategy or tactic utilized beyond pleading guilty so as to avoid the State's threat of amending the information to allege the habitual criminal charge, and (3) the result certainly would have been different if defendant had known that he could not be charged as a habitual criminal.

In State v. Geary[23], the standard in plea bargaining cases is stated as

> whether information, evidence, or a defense which would cast a reasonable doubt of defendant's guilt was available, but was not revealed due to counsel's lack of investigation of the case.[24]

Clearly, a more thorough investigation would have revealed that the defendant had not been twice previously convicted of a felony, and that even if the committing magistrate had allowed the information to be amended to assert the habitual criminal allegation, he would have been able to counsel the defendant that the threat of the amendment was without merit because he did not have the requisite previous conviction record. The defense counsel in this case apparently counseled with defendant immediately prior to the preliminary hearing on a Friday, determined that the defendant wanted to plead guilty after telling him about the prosecutor's threat regarding habitual criminal charges, and then stood with him at the further proceedings, including arraignment and sentence

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[23]707 P.2d 645 (Utah, 1985).

[24]id, at 647. See also State v. Colonna, 766 P.2d 1062 (Utah, 1988) which cites McGeary as the case giving the proper standard for a plea bargain situation.

which were on the following Monday. The attorney certainly failed to meet the test of competent counsel defined by a long line of Utah cases:

> [t]he accused is entitled to the assistance of a competent member of the Bar, who shows a willingness to identify himself with the interests of the defendant and present such defense that are available to him under the law and consistent with the ethics of the profession. This requirement is not fulfilled by a sham or pretense of an appearance on the record, by an attorney, who manifests no real concern about the interests of the accused.[25]

If counsel had identified himself with his client's interests, he would have inquired into the defendant's criminal background, if any, and then confronted the prosecutor with the facts--there was no grounds for alleging a habitual criminal. If the prosecutor thought he had a weak case, he undoubtedly would have made another offer to the defendant. As it was, the defendant plead under a misapprehension, and without knowledge of the facts. If the defendant had still desired to accept the offer, at least he would have known the situation which actually existed. As the United States Supreme Court stated in Strickland v. Washington,[26]

> Because of the vital importance of counsel's assistance, this Court has held that, with certain exceptions, a person accused of a federal or state crime has the right to have counsel appointed if retained counsel cannot be obtained [citations omitted]. that a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command.

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[25]Andreason v. Turner, 27 U.2d 182, 493 P.2d 1278 (1972).

[26]466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, 692.

The defendant's attorney did little more than be present when defendant was before the magistrate.[27] He was not effective in presenting the defendant's alternatives, or in counseling the defendant as to the law applicable to the facts.

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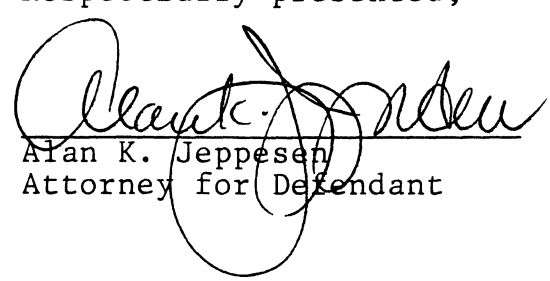
[27]See also, Alires v. Turner, 449 P.2d 241, 243 (Utah, 1969) "the right of an accused to have counsel as assured by Section 12, Art. I, Utah Constitution, [footnote omitted] and by the VI and XIV Amendments to the U. S. Constitution [footnote omitted] is one of those rights 'rooted in the traditions and conscience of our people' as essential to the protection of individual liberties and therefore included in our concept of due process of law [footnote omitted]. The requirement is not satisfied by a sham or pretense of an appearance in the record by an attorney who manifests no real concern about the interests of the accused.

CONCLUSION

The defendant was under a false assumption based upon the threat of the prosecutor that he could be charged with being a habitual criminal, and subject to an additional five to life sentence. Hence, his decision to plead guilty to Possession of a Controlled Substance with intent to Distribute as charged, in exchange for the dismissal of the lesser crime of Possession of a Firearm by a Restricted Person was not freely and voluntarily entered. Had his counsel properly advised the defendant regarding the Habitual Criminal requirements, a different result may have occurred. Defendant is entitled under the Sixth Amendment and Section 12 of Article I of the Utah Constitution to be granted his motion to withdraw his guilty plea, and the Court erred in denying that motion. Consequently, this Court should reverse the trial court's decision and remand for further proceedings, including a preliminary hearing.

Respectfully presented,



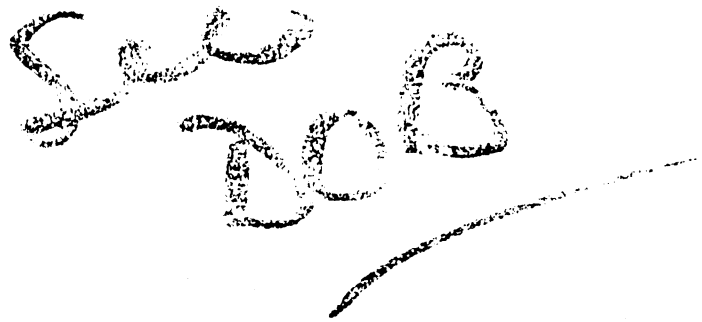
Alan K. Jeppesen
Attorney for Defendant

CERTIFICATE OF MAILING

I hereby certify that four copies of the foregoing Brief of Appellant were mailed postage prepaid this _____ day of June, 1989, to Paul R. Van Dam, Utah Attorney General, Attorney for Respondent, 236 State Capitol Building, Salt Lake City, Utah 84114, by depositing the same with the U. S. Postal Service in an envelope addressed to said attorney at the address given above.

_____

APPENDIX



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LUSCHEN, DOB/032954 SEX/M RAC/W HT/5-11 WT/150 HR/BR EYE/BL
STEWART, DEAN

THE BUREAU OF CRIMINAL IDENTIFICATION
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MOND PD (FINAL DISPOSITION)

MF/51709 073073 C-PETTY THEFT
073073 D-CONVICTED

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101873 D-CONVICTED

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HMOND PD (FINAL DISPOSITION)

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111775 D-CONVICTED

SENTENCED: 3D

PROBATION: 9M

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MF/7662 (FINAL DISPOSITION)

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021376 D-CONVICTED

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SENTENCED: 3Y

PROBATION: 1Y

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071976 D-CONVICTED

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PROBATION: 36M

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TE PRISON- (FINAL DISPOSITION)

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121178 D-CONVICTED

SENTENCED: 0Y-5Y

(PRELIMINARY DISPOSITION)

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EHENDED RET USP 092080 STATE PRISON-DRAPER MF/14538

LED FROM USP 081181 STATE PRISON-DRAPER MF/14538

L80300 041681 A-FUG FROM JUSTICE 4999
F LAKE PD
-111115 MF/118853

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR TOOELE COUNTY, STATE OF UTAH

* * * * * * * *

THE STATE OF UTAH, Plaintiff, Vs. STUART DEAN LUSCHEN, Defendant.	)	AFFIDAVIT OF FRANK MOHLMAN Case No. CR88-020

* * * * * * * *

STATE OF UTAH)
:ss.
COUNTY OF TOOELE)

Comes now, Affiant, having been previously sworn, and deposes and says as follows:

1. That he is an attorney licensed to practice in the State of Utah and that he is currently in private practice, having his place of business in Tooele City, Tooele County, Utah. That Affiant has practiced law on a full-time basis since SEPTEMBER 1973 and that a large portion of that practice has consisted of criminal defense work. That since FEBRUARY, 1986, the law firm in which affiant is a partner has had a contract with Tooele County to provide one-half of the indigent defense work needed in the County.

2. That as part of his contractual duties with Tooele County, Affiant was appointed to act as attorney for Defendant, Stuart Dean Luschen, in the above-named case.

That by reason of said appointment, affiant contacted Defendant Luschen prior to the date of Defendant's initial appearance before a committing magistrate.

3. That prior to the time Defendant waived preliminary hearing, Affiant had received from the prosecution copies of the police reports and other documentary evidence in the possession of the prosecution. That Affiant examined those documents and discussed with Defendant the charges pending against him and the evidence then possessed by the State.

4. That in the course of the conversations between Affiant and Defendant, Defendant indicated to Affiant that he had committed the acts alleged against him by the prosecution and that he, Defendant, simply wanted to enter a plea of guilty and begin serving whatever sentence the Court may impose.

5. That as part of Affiant's investigation of the allegations then pending against Defendant, Affiant spoke with Mark W. Nash, Deputy Tooele County Attorney. Prior to the waiver of the preliminary hearing, Mr. Nash indicated to Affiant that the State was looking into the possibility of filing habitual criminal allegations against Defendant. At the time of that conversation, no such allegations had been filed with the committing magistrate and Mr. Nash indicated to affiant that if Defendant desired to enter a plea of guilty to the Second Degree Felony charge of Possession of a Controlled Substance With Intent to Distribute the State would not make any attempt to file habitual criminal allegations against Defendant and would move to dismiss the Third Degree Felony then pending against Defendant. Affiant related to Defendant the nature and contents of the conversation he had had with Mr. Nash and explained to Defendant the nature of an habitual criminal allegation

and answered such questions as Defendant had. Defendant reiterated his desire to plead guilty to the Second Degree Felony charge and get on with whatever sentence the Court may impose.

On April 8, 1988, Defendant, accompanied by Affiant, appeared before Judge Edward A. Watson of the Sixth Circuit Court at which time Defendant waived his right to a preliminary hearing after having been admonished by Judge Watson as to the nature and purpose of a preliminary hearing.

5. Prior to the time Defendant waived preliminary hearing, Affiant had examined documentation received by him from the prosecution and had made a determination that probable cause existed for the filing of the charges then pending against Defendant (Possession of a Controlled Substance With Intent to Distribute and Possession of a Firearm by a Restricted Person). From the facts then available to Affiant, sufficient evidence existed against Defendant so as to allow the matter to be presented to a jury and so as to allow a reasonable jury to reach a finding of guilt on both charges. At no time did Affiant tell Defendant that he would be convicted of what ever he was charged with, including an habitual criminal charge. Affiant went over the evidence then in possession of the State with Defendant and gave Defendant a fair and professional assessment of the evidence.

6. At no time did Affiant promise Defendant that he would bring this matter before the Court about 3 months after the entry of guilty plea nor was any such request made of Affiant by Defendant. Affiant can recall no conversation with Defendant concerning concurrent or consecutive sentences or concerning a review of the sentence after Defendant was sentenced in California, except as contained in the transcript of the arraignment and

sentencing and in the Affidavit signed by Defendant at time he entered his guilty plea. Affiant has carefully examined both the transcript and the Affidavit and states that those documents present a complete representation of the proceedings before the District Court on April 11, 1988. Affiant states that he went over the Affidavit of Defendant with Defendant thoroughly and carefully, prior to the time Defendant entered his guilty plea, and answered all questions Defendant may have had concerning the contents of the Affidavit. Defendant appeared to have a full understanding of his constitutional rights and Defendant understood that he was waiving those rights by pleading guilty. At no time did Defendant claim that he was pleading guilty because of any threat, coersion or promise except as contained in the Affidavit of Defendant.

7. At no time did Affiant advise Counsel to misrepresent any fact to the Court and specifically Affiant did not advise Defendant to fallaciously indicate that no promises or threats had been made.

8. Following Defendant's plea of guilty and sentencing by the District Court, Affiant closed his file in the above-named case and cannot recall being contacted by any messenger on behalf of Defendant, either in person, by telephone, or in writing.

9. At no time did Affiant collude with the prosecution in an attempt to obtain Defendant's plea of guilty. Affiant fully represented to Defendant all conversations between himself and the prosecuting attorney and, to the best of his ability, fully and accurately represented the nature and extent of the evidence held by the State. When Defendant indicated to Affiant that Defendant desired to be sentenced immediately after entry

of a guilty plea, Affiant informed Defendant that he would very likely be sent to the Utah State Prison. Affiant discussed with Defendant the possibility of obtaining a presentence report from the Department of Adult Probation and Parole and the purpose of such an investigation but Defendant persisted in his desire to be sentenced immediately.

10. To the best of Affiant's knowledge, Defendant understood the nature of the allegations against him, the extent and nature of the evidence held by the State against him, the nature of the plea negotiation offered by the State, the elements of the charges filed against him, and Defendant understood all of his constitutional rights as set forth in the Affidavit of Defendant and knowingly and intelligently waived those rights prior to entry of his guilty plea.

DATED this 3RD day of FEBRUARY, 1989.

FRANK T. MOHLMAN

SUBSCRIBED AND SWORN to before me this 3rd day of February, 1989.

NOTARY PUBLIC

MY COMMISSION EXPIRES:

2/23/91

Residing at: Provo Utah